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No. 86-1589

In The
Supreme Court of the United States
October Term, 1986

HENRY T. PRICE,
Petitioner,

v.

TAMPA ELECTRIC COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

The lower courts decided this case by the application of clear statutory mandate and administrative regulations to undisputed facts. The Petition attempts to recharacterize these facts in such a manner to allow Petitioner to recover. He points to no significant legal issues or conflict among the Circuit Courts.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The Order of the United States District Court for the Middle District of Florida is unreported, and is reproduced at pp. A5-A9 of the Petition.

The Decision of the United States Court of Appeals for the Eleventh Circuit is reported at 806 F.2d 1551 (11th Cir. 1987), and is reproduced at pp. A1-A4 of the Petition.

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JURISDICTION

This Court has jurisdiction to review the decision of the Court of Appeals on petition for certiorari under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The applicable provisions of law are set forth in the Petition at pp. 1-4.

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STATEMENT OF THE CASE

Petitioner Henry T. Price filed this action against his employer, Tampa Electric Company,[1] in the United

[1] Tampa Electric Company is a public utility primarily engaged in generating and distributing electrical power to residential and commercial users.

States District Court for the Middle District of Florida. He sought recovery under § 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) ("FLSA"), for unpaid overtime compensation, liquidated damages, attorney's fees and costs.[2] Specifically, he demanded thirty thousand dollars ($30,000) in overtime compensation for time allegedly spent taking home study courses.

At the close of discovery, Tampa Electric Company moved for summary judgement on the grounds, *inter alia*, that the courses were voluntarily taken in an attempt to obtain a higher paying position, therefore, the study time did not constitute working hours under 29 C.F.R. § 785.27. The motion cited Petitioner's deposition testimony establishing these facts. Petitioner's response to the summary judgement motion included an affidavit wherein he contradicted his deposition testimony regarding the reasons for taking the courses.

On March 13, 1986, the District Court granted the summary judgement motion and dismissed the Complaint. The Court noted that: "Not only are the material facts not in dispute but the plaintiff's case is internally defective to a degree that makes questionable his good faith." On January 5, 1987, the United States Court of Appeals

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[2] Petitioner had previously unsuccessfully sought redress in the form of a grievance under the collective bargaining agreement, which the union refused to pursue on his behalf (Petition, p. A25), and in a charge filed with the U.S. Department of Labor, which was denied (Petition, p. 6).

for the Eleventh Circuit affirmed the District Court's Order granting summary judgement.[3]

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REASONS FOR DENYING THE WRIT

The decision below turns upon the particular facts of this case and affirms well-established law with regard to overtime compensation for home-study courses.

Under the regulations issued by the Department of Labor pertaining to "hours worked" under the FLSA, time spent in training programs need not be counted as working time if: (1) attendance is voluntary; (2) the course is not directly related to the employee's job; (3) attendance is outside of the regular working hours; and (4) the employee does not perform productive work during attendance. 29 C.F.R. § 785.27. "Where a training course is instituted for the *bona fide* purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his

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[3] Since the Complaint was dismissed on other grounds, neither the District Court nor the Court of Appeals found it necessary to pass on Tampa Electric Company's defense that the claim should be barred since the alleged violation "was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" of the Department of Labor. Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259. *See also Marshall v. Baptist Hospital*, 668 F.2d 234, 239 (6th Cir. 1981).

regular work." 29 C.F.R. § 785.29. Since the Department of Labor is authorized to interpret and administer the Wage and Hour Laws, its regulations are entitled to great weight. *Udall v. Tallman,* 380 U.S. 1 (1965); *Merrill v. Exxon Corp.,* 387 F.Supp. 458 (S.D. Tex. 1974).

The Petitioner does not dispute the applicability or correctness of the DOL's regulations; he merely attempts to distort the facts of his case, as found by the Courts below, to allow him to recover under these provisions. This Court has repeatedly stated that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *See, e.g., Berenyi v. Director, Immigration and Naturalization Service,* 385 U.S. 630, 635 (1967).

The record in this case clearly reveals that the home-study courses taken by Petitioner were for the "bona fide purpose of preparing for advancement through upgrading the employee to a higher skill," therefore, his study time is not compensable.

The Petition correctly asserts that in 1981: Petitioner had been a Meterman in Respondent's meter department for 34 years; that advancing technology had begun to gradually bring about a change from traditional electro-mechanical metering devices to new state-of-the-art solid state equipment; that Respondent and Petitioner's Union negotiated a new collective bargaining agreement dividing the then existing Meterman classification into categories including Meter Mechanic "A", Meter Mechanic "B", and Meterman; that under the new agreement, Metermen were to be assigned to work on the

electro-mechanical equipment while the Meter Mechanics would be assigned to work on the new solid state meters; and that the existing Metermen were allowed the option of remaining in Meterman classification at the same rate of pay, or electing to move to the higher-paying Meter Mechanic "B" category immediately, upon the condition that they complete a home-study course in solid state technology. (Petition, pp. 4-5).

Petitioner errs, however, when he states that his "home study courses were related to his work and were completed by him involuntarily as his failure to do so outside working hours would have resulted in a demotion to the Meterman classification created by the agreement." (Petition, p. 6). The "demotion" of which Petitioner speaks would have been merely a return to his original Meterman position for failure to meet the conditions of the promotion. Thus, as noted by the District Court, "[s]uch is not a 'demotion' and cannot be used as a basis for arguing that plaintiff's choice to pursue the coursework and receive the higher class B pay was involuntary. To conclude otherwise in the context of this case would be to penalize an employer for offering employees an incentive for self-improvement." (Petition, p. A7).

Mr. James P. Rowland, Business Agent for Petitioner's union,[4] explained the conditional promotion as follows:

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[4] Petitioner was a member of the unit of employees represented by the union as well as a union member (see Petition, p. 6); therefore, the negotiated job classifications and promotional prerequisites were binding on him. *See, e.g., Britt v. Trailmobile Co.*, 179 F.2d 569, 572 (6th Cir. 1950), *cert. denied*, 340 U.S. 820 (1951).

> [E]ach Meterman had the option to move to the Meter Mechanic "B" position with a higher rate of pay if he would agree to sign up for and complete four (4) Heathkit courses. The purpose of these Heathkit courses was to teach the individuals the new and sophisticated skills necessary to learn to work on solid-state meters. The Metermen who decided *not* to sign up for and take the Heathkit courses were allowed to retain their Meterman position and continue to do the work which they had always done. The Metermen who elected to sign up for and take the Heathkit courses were immediately moved into the higher paying Meter Mechanic "B" position in accord with the immediate pay increases which the Union negotiated.
>
> I personally conveyed these options to the Metermen, including Henry T. Price, during a meeting with them. Henry T. Price elected to take the Heathkit courses in order to obtain the higher paying position of Meter Mechanic "B".

(Petition, pp. A24-A25). Had the company and the union not agreed to a conditional promotion, but instead required the Metermen to complete the courses *prior* to being elevated to Meter Mechanic, there would be no question that the courses were being taken "for advancement through upgrading the employee to a higher skill" (29 C.F.R. § 785.29). The Courts below properly found that the conditional promotion did not alter the purpose of the courses.

Petitioner also argues that summary judgement was inappropriate since there were "sharply disputed facts" as to his job duties before and after the 1981 collective bargaining agreement. This alleged dispute was raised in his

affidavit[5] opposing summary judgement and contradicts his deposition testimony that 90% of his time was spent testing rubber goods, and the remaining 10% was spent working on the metering equipment that the company had been using for several years. (*See* Petition, p. A3).

To the extent that this affidavit contradicts Petitioner's deposition testimony, it was properly disregarded. *See, e.g., Perma Research and Development Co.*, 410 F.2d 572, 578 (4th Cir. 1969) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgement as a procedure for screening out sham issues of fact."). Moreover, the Court below held that the affidavit was patently unbelievable:

> Appellant contends that he was already familiar with the operation of solid-state meters as a result of his work on advanced components of the traditional meters, but this claim seems inconsistent with his assertion that he spent more than 2,000 hours studying the courses at home. Yet, assuming that appellant already possessed all of the skills necessary to work on the new solid-state meters, he would not be entitled to overtime compensation for his study time. The appropriate relief would have been to seek a waiver of the course requirement, prior to enrollment and completion of the four courses.

(Petition, p. A4).

The affidavit is also insufficient to raise a factual issue in view of record evidence that the courses were

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[5] The affidavit claimed that Petitioner had worked on solid state equipment prior to 1981. (Petition, pp. A19, A20).

for the purpose of preparing employees to repair and maintain "the solid state meters which the company might use *in the future*" (Petition, p. A24) (emphasis added), thus Petitioner's alleged work on the limited amount of solid state equipment the company used at the time is immaterial.

The Court therefore did not err in affirming summary judgement since there was no "genuine issue as to any material fact." *Fed. R. Civ. P.*, 56.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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